



Comptroller General  
of the United States

Washington, D.C. 20548

*Calhoun*  
152954

10-332211

## Decision

**Matter of:** 841 Associates, L.P.; Curtis Center Limited Partnership

**File:** B-257863; B-257863.2

**Date:** November 17, 1994

William M. Rosen, Esq., and Timothy C. Hutchens, Esq., Dickstein, Shapiro & Morin, for the protesters.  
Robert J. McCall, Esq., General Services Administration, for the agency.  
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protests that contracting agency failed to conduct meaningful discussions with the protesters under the procurement for lease of office space are denied where the record does not support these allegations.
2. New and independent protest allegation concerning the interpretation of the solicitation's evaluation scheme, raised for the first time in the protester's comments on the agency report, is dismissed as untimely where the protester possessed the information necessary to raise the argument at the time it filed its initial protest.
3. Award to higher-priced, technically superior offeror was proper where, despite source selection official's failure to specifically discuss the price/technical tradeoff in the selection decision document, the record shows that the agency reasonably decided that the higher-priced awardee's proposal was worth the additional cost.

### DECISION

841 Associates, L.P. and Curtis Center Limited Partnership protest the award of a lease to The Philadelphia Center Realty Associates under solicitation for offers (SFO) No. MPA 94008, issued by the General Services Administration (GSA) for office space in Philadelphia, Pennsylvania. Curtis Center argues that the agency improperly failed to conduct meaningful discussions with the firm; improperly awarded the contract to a firm other than the lowest-priced, technically acceptable offeror; or, in the alternative, improperly failed to conduct a price/technical tradeoff

analysis prior to awarding the lease. 841 Associates, which joins Curtis Center in its argument concerning GSA's price/technical tradeoff analysis, also argues, among other things, that the agency improperly failed to conduct meaningful discussions with the firm.

We deny the protests.

#### BACKGROUND

GSA issued the SFO on November 30, 1993, seeking proposals for approximately 72,500 net usable square feet of office and related space to house the Department of Housing and Urban Development. The office space was to be located in Philadelphia's central business area, with occupancy required 120 days after receipt of approved floor plans by the lessor. The SFO contemplated award of a 10-year lease, with termination rights after the fifth full year of occupancy.

Paragraph 2.4 of the solicitation advised that award would be made to the offeror whose proposal was considered most advantageous to the government, price and other award factors considered, and that price would be of equal weight to these other award factors, which were listed, in descending order, as follows: fire and life safety, past performance, proximity of public transportation, and efficiency of offered space. However, paragraph 2.5 of the solicitation advised that award would be made to the offeror whose offer conformed to the solicitation's requirements and was the lowest-priced offer submitted.

By the March 15, 1994, closing date for receipt of initial offers, GSA received four proposals, including one from each protester and the awardee. After evaluation of the initial proposals, all four proposals were included in the competitive range. Discussions were conducted, and best and final offers (BAFO) were received on April 15.

The contracting officer rated the proposals on each of the award factors as excellent, fair, good, or poor. With respect to price, the agency calculated a net present value

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<sup>1</sup>While the relative weight of these award factors was not specified in the solicitation, the source selection plan indicated that they were listed, as above, in descending order of importance. An appropriate method of disclosing the relative weights of evaluation criteria is to list the factors in descending order of importance or priority. General Exhibits, Inc., 56 Comp. Gen. 882 (1977), 77-2 CPD ¶ 101; North-East Imaging, Inc., B-256281, June 1, 1994, 94-1 CPD ¶ 332.

per square foot based on the offerors' rent charges over the life of the anticipated lease. The following is a summary of the evaluation results for the relevant offerors:

	<u>Philadelphia Center</u>	<u>Curtis Center</u>	<u>841 Associates</u>
<u>Technical:</u>			
Safety	Excellent	Good	Good
Past Performance	Excellent	Fair	Fair
Transportation	Excellent	Excellent	Excellent
Efficiency	Excellent	Poor	Poor
<u>Price:</u>			
Present Value/SF	\$15.72	\$14.90	\$12.13

The contracting officer concluded that 841 Associates's offered space was problematic due to its lack of windows, and he had serious doubts that it could meet its schedule for moving an existing tenant in time to comply with the 120-day occupancy requirement. Consequently, he determined that only the offers of Curtis Center and Philadelphia Center were "responsive" to the solicitation.<sup>2</sup> However, the contracting officer stated that Curtis Center had poor space efficiency due to the presence of ramps and numerous columns, and doubted that it could provide the required square footage in the stated time frame due to its need to move an existing tenant. As a result, the contracting officer determined that Curtis Center's proposal was the "lesser of the two responsive offers," and awarded the lease to Philadelphia Center on May 17. Both Curtis Center and 841 Associates filed agency-level protests of this award on June 2; when these protests were denied, the instant protests were filed in our Office.

#### MEANINGFUL DISCUSSIONS

In their initial protests, both Curtis Center and 841 Associates argued that GSA improperly failed to conduct meaningful discussions with them. Both protesters specifically argued that GSA did not discuss their perceived inability to satisfy the delivery date due to their need

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<sup>2</sup>The offers of the incumbent lessor, which submitted an initial proposal on the same day BAFOs were due, and the remaining offeror were found nonresponsive to the solicitation for reasons not relevant to this protest.

to relocate existing tenants, and did not ask for relocation schedules, and did not advise them of any weaknesses under the other award factors.

The record does not support these allegations. As to both protesters, the price negotiation memorandum clearly states that the realty specialist raised the issue of moving the existing tenants, asked for relocation schedules, and discussed other relevant issues. Further, as to Curtis Center, the realty specialist has submitted an affidavit in which he attests that he informed the protester that its offered space was "column-rich," making it difficult for the new tenant to lay out the space, and that he disclosed his concerns with meeting the occupancy date requirements and requested a relocation schedule.

In its comments submitted in response to the agency's report, Curtis Center does not rebut the realty specialist's affidavit, but merely states that the price negotiation memorandum does not evidence meaningful discussions as to the efficiency of its offered space. Since the record contradicts this claim, and the protester has failed to rebut the averments made by the realty specialist, the record does not support its allegation.<sup>4</sup>

Similarly, in its comments on the agency report, 841 Associates does not address the agency's response regarding this allegation except to state that it is

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<sup>3</sup>Also, in their initial protests, Curtis Center argued that the agency improperly gave it insufficient time in which to prepare its BAFO, and improperly evaluated its proposal; and 841 Associates argued that the agency unlawfully used undisclosed evaluation factors in its evaluation of the firm's proposal. The agency report responded to these allegations, and the protesters' comments failed to address the agency's responses. As a result, we consider these issues to be abandoned and will not address them. Datum Timing, Div. of Datum Inc., B-254493, Dec. 17, 1993, 93-2 CPD ¶ 328.

<sup>4</sup>In its comments, Curtis Center also stated, incorrectly, that its request for a hearing on this matter was denied by our Office prior to the submission of its comments. A ruling on this matter was not issued prior to the filing of the protester's comments, and, since Curtis Center's comments failed to rebut the realty specialist's affidavit, no hearing was deemed necessary subsequent to the filing of those comments. See Border Maintenance Serv., Inc.--Recon., 72 Comp. Gen. 265 (1993), 93-1 CPD ¶ 473.

meritorious and has not been waived. Because the record contradicts this claim, and the protester does not address the evidence in the record at all, we conclude that it has effectively abandoned this basis of protest, and will not consider it further. Datum Timing, Div. of Datum Inc., supra.

#### EVALUATION SCHEME

In its initial protest, Curtis Center stated that the solicitation's provisions concerning evaluation and award, paragraphs 2.4 and 2.5, described above, were contradictory "on their face." Curtis Center asserted that "based upon its review of the SFO and subsequent discussions with [the realty specialist], [it] understood" that the procurement was being conducted on a "price only" basis. The protester specifically stated that it was not protesting the solicitation's internal contradiction,<sup>5</sup> but, rather, GSA's failure to adhere to guidance it had provided to resolve the contradiction.

The agency's report included an affidavit from the realty specialist in which he specifically denies having stated that the procurement would be on a "price only" basis and, in its comments on the agency report, Curtis Center does not rebut the realty specialist's statement. In fact, the protester makes no attempt to further explain how it had been "led to believe" that the contradiction had been resolved. As a result, Curtis Center's argument in this regard has been abandoned and we will not consider it. See Datum Timing, Div. of Datum Inc., supra.

While Curtis Center did not pursue its initial argument in its comments, it raised a new argument which stands in stark contrast to its original position. The protester now maintains that the two evaluation provisions can reasonably

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<sup>5</sup>841 Associates also erroneously stated that its request for a hearing on this matter was denied by our Office prior to the submission of its comments. See footnote 4, supra.

<sup>6</sup>The presence in the solicitation of both paragraphs 2.4 and 2.5, the first of which contemplates award on a best value basis, and the second of which contemplates award on a low-priced, technically acceptable basis, gave rise to a patent ambiguity. Such ambiguities constitute deficiencies on the face of a solicitation; under our Bid Protest Regulations, such a deficiency must be protested prior to the time set for receipt of initial proposals. See 4 C.F.R. § 21.2(a)(1); General Elec. Co., 72 Comp. Gen. 519 (1992), 92-2 CPD ¶ 159; see also Norris Bldg. Co., Inc., B-253621, Sept. 17, 1993, 93-2 CPD ¶ 173.

be read together to require award to the low-priced, technically acceptable offeror.

Each new protest allegation must independently satisfy the timeliness requirements of our Bid Protest Regulations, which do not contemplate the piecemeal presentation or development of protest issues. See GE Gov't Servs., B-235101, Aug. 11, 1989, 89-2 CPD ¶ 128. As a general rule, the timeliness of specific bases of protest raised after the filing of a timely initial general protest depends upon the relationship the later-raised bases bear to the initial protest. See Kappa Sys., Inc., 56 Comp. Gen. 675 (1977), 77-1 CPD ¶ 412. Where the later bases present new and independent grounds for protest, they must independently satisfy our timeliness requirements. Conversely, where the later contentions merely provide additional support for an earlier timely-raised objection, we consider these additional arguments. Id.; GE Gov't Servs., supra; Annapolis Tennis Ltd. Partnership, B-189571, June 5, 1978, 78-1 CPD ¶ 412, aff'd, July 11, 1978, 78-2 CPD ¶ 28.

We consider the argument raised in Curtis Center's comments to constitute a new and independent basis of protest rather than additional supporting material for its earlier, now abandoned, objection. At the core of Curtis Center's initial objection was its position that the solicitation's two evaluation provisions presented a contradiction "on their face." Curtis Center now abandons that position and argues that the two evaluation provisions can be reasonably read together to require GSA to award the lease to the low-priced, technically acceptable offeror. This latter contention in no way supports the earlier-raised objection; on the contrary, it wholly undermines that objection.

Our Bid Protest Regulations require that protests not based upon apparent solicitation improprieties be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). The information underlying the position taken in Curtis Center's comments--the solicitation's two evaluation provisions and the fact that the agency interpreted those provisions as requiring award on a best value basis--was made available to the protester in the agency's June 21 denial of its agency-level protest. Since this basis of protest was not raised until Curtis Center filed its comments on September 12, more than 2-1/2 months later, we conclude that the argument is untimely and not for our consideration. See Annapolis Tennis Ltd. Partnership, supra.

## PRICE/TECHNICAL TRADEOFF

Curtis Center alternatively argues that GSA improperly failed to perform a price/technical tradeoff analysis by failing to address the merits of paying the additional cost for Philadelphia Center's technically superior proposal.<sup>7</sup>

Agency officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Price/technical tradeoffs may be made, and the extent to which one is sacrificed for the other is governed by the test of rationality and consistency with the established evaluation factors. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325; Kurt Eickhof, B-240128, Oct. 16, 1990, 90-2 CPD ¶ 297. This discretion exists notwithstanding the fact that price and technical factors were of equal weight. Shirley Constr. Corp., 70 Comp. Gen. 62 (1990), 90-2 CPD ¶ 380; McShade Gov't Contracting Servs., B-232977, Feb. 6, 1989, 89-1 CPD ¶ 118. We will not disturb awards to offerors with higher technical scores and higher prices so long as the result is consistent with the evaluation factors and the agency has reasonably determined that the technical superiority outweigh the price difference. Kurt Eickhof, supra.

While the source selection official's judgment must be documented in sufficient detail to show that it is not arbitrary, KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD ¶ 447, a source selection official's failure to specifically discuss the price/technical tradeoff in the selection decision document does not affect the validity of the decision if the record shows that the agency, in consideration of the relative technical merit of the awardee's and the low-priced protester's proposals, reasonably decided that the higher-priced awardee's proposal was worth the additional cost. McShade Gov't Contracting Servs., supra.

In this case, the contracting officer, concurring with the realty specialist, found that while Curtis Center's proposal was "responsive" to the solicitation, the offer had some

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<sup>7</sup>This allegation was also raised by 841 Associates in its initial protest. However, as the record shows that the protester's offer was not considered to be acceptable, and the protester has abandoned all of its arguments except this one, 841 Associates does not have the direct economic interest to be considered an interested party to raise this basis of protest, as it would not be in line for award even if its protest were sustained. 4 C.F.R. § 21.0(a); see ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7.

weaknesses. Most importantly, the offered space had the highest column ratio of all the offered buildings and, due to the tightness of the columns and the irregularity of their placing throughout the remainder of the space, systems furniture layout would be extremely difficult. The space also contained ramps which did not conform with the SFO's requirement for a floor with a common level. Finally, as discussed above, the contracting officer noted that the existing tenant would have to be moved to provide contiguous space, and that Curtis Center's alternative offer contained insufficient square footage. In comparison, Philadelphia Center's proposal was clearly considered to be superior, receiving a rating of excellent for each award factor. Notably, the price negotiation memorandum states that the offered space contained large blocks of column-free space, and GSA's space planning evaluation indicates a consistent dimension between all of the columns in the building.

Turning to the matter of price, the record shows that the prices of both offerors were considered to be reasonable. While the protester argues that the award was improperly made to Philadelphia Center in spite of its "uncured deficiency" as to price,<sup>8</sup> the record supports GSA's claim that this use of the word "deficiency" was merely a poor word choice. The difference between the prices offered by Philadelphia Center and Curtis Center, in present value terms, was only 5 percent, or \$594,500 over the entire 10-year lease term. Considering the significant technical superiority of Philadelphia Center's proposal, and the marginal difference in price between the offers of

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<sup>8</sup>The realty specialist stated, in the price negotiation memorandum, that he met with Philadelphia Center's representatives "to discuss the following deficiencies" in its offer, one of which was that the price was "high-end and should be lowered." Philadelphia Center did not subsequently lower its price. The awardee explained in its BAFO that it did not lower its price because the offered space was raw, and various systems work had to be completed in addition to the build-out.



Philadelphia Center and Curtis Center, we think that the record supports the agency's decision to award the lease to the technically superior, higher-priced offeror, Philadelphia Center.<sup>9</sup>

The protests are denied.

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 for Robert P. Murphy  
 Acting General Counsel

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<sup>9</sup>While, viewed in whole, the record supports the selection official's judgment, the better practice here would have been for the agency to document the specific rationale for the price/technical tradeoff. See KMS Fusion, Inc., supra.